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NO. 06-511

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; CONNER BLAINE, Superintendent State Correctional Institution at Greene; JOSEPH P. MAZURKIEWICZ, Superintendent State Correctional Institution at Rockview,

Petitioners,

v.

ANDRE STEVENS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Dated: January 12, 2007

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant certiorari in order to review the unanimous rulings of the lower federal courts, after giving appropriate deference to the state court rulings, that the prosecution failed to carry its burden of establishing that a juror was excludable under well established precedent, see Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412 (1985); and that the state courts' contrary rulings were unreasonable, as well as clearly and convincingly erroneous?

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For the reasons stated below, this Court should deny the petition for writ of certiorari, which does not present any important federal question but, instead, merely asks this Court to review the lower courts' application of well-established law, including the standards for review of state court decisions provided in 28 U.S.C. § 2254(d) and (e), to the facts of this case.[1]

COUNTER-STATEMENT OF THE CASE

A. Relevant Sixth and Fourteenth Amendment Decisions: The governing law with respect to exclusion of jurors based on their views regarding the death penalty is well established. This Court first addressed the issue at length in Witherspoon v. Illinois, 391 U.S. 510 (1968). Witherspoon held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause *simply because they voiced general objections to the death penalty* or expressed conscientious or religious scruples against its infliction." Id. at 522. The Court indicated it was particularly concerned by the exclusion of prospective jurors who "said they did not 'believe in the death penalty'" and were then immediately excused, "without any attempt to determine whether they could nonetheless return a verdict of death." Id. at 514. As the Court noted, it is "entirely possible" that a juror who is resolutely opposed to the death penalty "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Id. at 514 n.7.

This Court returned to the issue in Adams v. Texas, 448 U.S. 38 (1980). The Court

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[1]The petition for writ of certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." The Commonwealth has filed an Appendix, which is cited herein as "Pet. App." followed by the page number. All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

restated the Witherspoon standard as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45.

In Wainwright v. Witt, 469 U.S. 412 (1985), this Court clarified two aspects of the law relating to juror exclusions: (1) that the proper standard is the one stated in Adams, i.e., "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" Witt, 469 U.S. at 424; and (2) that a state court's finding of juror bias is a finding of fact entitled to a presumption of correctness under the then-extant version of 28 U.S.C. § 2254(d). Id. at 426-29.[2] Applying the Adams standard and the presumption of correctness, this Court concluded that the state court had properly excused a juror who repeatedly indicated that her personal opposition to the death penalty likely would interfere with her ability to judge the guilt or innocence of the defendant. Id. at 434-35; see id. at 416 (when asked if her views would "interfere" with her performance as a juror, juror replied, "'*I am afraid it would*'"; "'*I think so*'"; and "'*I think it would*'"). Witt, Adams and Witherspoon continue to govern the circumstances under which a juror may be excluded because of his or her bias with respect to the death penalty.

B. The Stevens State Court Proceedings: Mr. Stevens was convicted at a bench trial of two counts of first degree murder. Following the bench trial, the court impaneled a jury

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[2]This Court also made clear that "it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality." Id. at 423.

for capital sentencing. The first potential juror to express any concerns about the death penalty – and the only juror to do so on the first day of jury selection – was Nancy Hartling. Pet. App. 23a. The sole substantive question the court asked Ms. Hartling was as follows: "Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?" Pet. App. 2e. Ms. Hartling responded, "I don't believe in the death penalty," upon which the prosecution immediately challenged her for cause, and the court excused her without objection from the defense or further discussion. Pet. App. 3e.

The capital sentencing jury found both aggravating and mitigating circumstances, and sentenced Mr. Stevens to death on both counts of first degree murder. Pet. App. 3d-4d. The Pennsylvania Supreme Court affirmed the convictions and death sentences on direct appeal. Commonwealth v. Stevens, 670 A.2d 523 (Pa.), cert. denied, 519 U.S. 855 (1996).

In state post-conviction proceedings, Petitioner alleged that the trial court excluded Ms. Hartling from the jury in violation of his right to an impartial jury under the Sixth and Fourteenth Amendments, and that trial and appellate counsel were ineffective for failing to object and raise this issue. Pet. App. 7d-9d. The state trial judge – Judge Kunselman – rejected the claim on the merits.

Judge Kunselman acknowledged that the "relevant inquiry" under Witt and Adams – into whether the juror's views would prevent or substantially impair the performance of her duties – *"was not made of Mrs. Hartling."* Pet. App. 7d. He stated a belief that "the tone of [Ms. Hartling's] response and her demeanor when she responded to our question" made up for the absence of the "relevant inquiry." Id. However, Judge Kunselman admitted that he had *"no specific recollection of Mrs. Hartling."* Pet. App. 8d. Judge Kunselman simply assumed that

"had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause." Id.

Petitioner raised both the Witherspoon/Witt claim and the ineffective assistance claim on appeal of the trial court's denial of relief, exhausting both claims. Pet. App. 18a-19a & n.11. The Pennsylvania Supreme Court affirmed the denial of relief, relying on "the statement of the trial court in its opinion ... that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question." Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999); Pet. App. 27c.

C. Federal Court Proceedings: After exhausting state remedies, Mr. Stevens filed a petition for writ of habeas corpus in the District Court raising the Witherspoon/Witt claim and several other constitutional challenges to his conviction and death sentence.

The District Court treated the state court rulings as rulings on the merits of the Witherspoon/Witt claim.[3] Recognizing that the issue of juror bias is generally characterized as a factual determination, the District Court applied both 28 U.S.C. §§ 2254(d)(2) and (e)(1) in reviewing the state court decisions, finding that Petitioner had made the required showing under both provisions. Stevens v. Horn, 319 F. Supp. 2d 592, 599 & n.4 (W.D. Pa. 2004); Pet. App. 11b-12b and n.4.

In analyzing the claim, the District Court first set forth the governing standard from Witherspoon and Witt. Pet. App. 13b-14b. Recognizing that the state court's finding as to Ms. Hartling was entitled to a presumption of correctness, the District Court concluded that the

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[3]Neither in the lower federal courts nor here has the Commonwealth contended that there is any independent and adequate procedural bar to review of the merits of the Witherspoon claim.

presumption of correctness was overcome because there was *no support in the record* for the trial court's finding:

> [E]ven under AEDPA's standards of review there must be some actual support reflected in the record to support the conclusion that the potential juror would not be able to set aside his or her bias against the death penalty and apply the law as instructed by the trial court. In this case, there is no such support.
>
> * * *
>
> [T]he veniremember in this case expressed only her general opposition to capital punishment.

Pet. App. 18b-19b (citations omitted).

As the District Court concluded:

> Here, the veniremember made only one statement: "I don't believe in the death penalty." Even through the lens of AEDPA's standards of review, the trial court's assessment of bias on that statement alone amounts to constitutional error.

Pet. App. 23b.

The District Court noted that Witherspoon violations are not subject to harmless error analysis. Pet. App. 23b, citing Gray v. Mississippi, 481 U.S. 648, 668 (1987); Davis v. Georgia, 429 U.S. 122, 123 (1976) (per curiam).[4] Having found a violation of Witherspoon, and that the state trial court's contrary ruling was unreasonable and unsupported by the record, the District Court granted Petitioner a new sentencing hearing. Pet. App. 23b-24b. The Commonwealth appealed to the Third Circuit.

In reviewing the state courts' finding, the Third Circuit applied 28 U.S.C. § 2254(e)(1), rather than § 2254(d)(2). See Stevens v. Horn, 187 Fed. Appx. 205, 212-13 & n.10 (3d Cir.

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[4]Respondents have not challenged that ruling in the courts below or in this Court.

2006); Pet. App. 17a and n.10.[5] The Third Circuit "agree[d] with the District Court that Stevens met [his] burden" of rebutting the (e)(1) presumption of correctness by clear and convincing evidence. Pet. App. 19a-20a.[6]

Like the District Court, the Third Circuit relied on the *complete absence from the record* of any evidence supporting a conclusion that Ms. Hartling was biased:

> [Ms. Hartling] indicated no more than that she opposed the death penalty. Because the trial judge did not follow up Hartling's single statement with any follow-up questioning, there is simply no tangible evidence in the record to support the finding of the state courts. In the absence of *any* evidence in the record to support the state courts' finding, it must be true that Stevens has established, by the requisite clear and convincing evidence, that Hartling was removed for cause on a "broader basis than inability to follow the law or abide by [her] oath [as a juror]." Indeed, the record supports but a single conclusion – that Hartling was removed merely because she expressed opposition to the death penalty.

Pet. App. 20a (quoting Adams, 448 U.S. at 48) (emphasis original) (citation omitted).

The state court's assumption that Ms. Hartling was emphatic in her demeanor when she stated her opposition to the death penalty did not alter the result. As the Third Circuit explained, Witherspoon requires the trial and reviewing courts to distinguish between (1) opposition to the

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[5]The Third Circuit explained that, in its view, subsection (e)(1) is more applicable to the juror bias finding at issue here, and that in any event it is more difficult for a habeas petitioner to rebut the (e)(1) presumption of correctness than to make the (d)(2) unreasonableness showing. Id. While the Commonwealth seeks review of the Third Circuit's application of subsection (e)(1), it has not challenged the Third Circuit's decision to focus on (e)(1) as opposed to (d)(2).

[6]This Court today granted a petition for writ of certiorari in Brown v. Lambert, 451 F.3d 946 (9th Cir. 2006), cert. granted sub nom. Uttecht v. Brown, No. 06-413 (U.S. Jan. 12, 2007). The certiorari petition in Brown asserts that the Ninth Circuit failed to apply the statutory presumption of correctness, Petition for Writ of Certiorari at i, and notes that the Third Circuit has correctly applied the presumption. Id. at 18 (citing Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003)). The Third Circuit's ruling here, which did apply the § 2254(e)(1) presumption of correctness, is thus evidently quite different from the Ninth Circuit's ruling in Brown.

death penalty – however strongly felt or expressed – which does *not* justify exclusion from the jury, and (2) interference with the juror's ability to perform her duties, which the State must establish if it is to exclude the juror:

> Even *if* Hartling *emphatically* stated that she did not "believe in" the death penalty, all that could reasonably be inferred is that her moral opposition to capital punishment was strongly felt. Supreme Court precedent makes clear, however, that the true question was whether Hartling would have been able to set aside her "conscientious or religious scruples against" the death penalty, Witherspoon, 391 U.S. at 522, and "faithfully and impartially apply the law." Witt, 469 U.S. at 426. That Hartling's "conscientious or religious scruples" were strongly felt says remarkably little about whether she could follow the trial court's instructions.

Pet. App. 21a (emphasis original) (citing Lockhart v. McCree, 476 U.S. 162, 176 (1986)).

The Third Circuit also discussed its Witherspoon decisions in habeas corpus cases. See Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001); Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003). In Szuchon, as here, a prospective juror was excused immediately after he answered a question about whether he could convict the defendant of first degree murder by answering, "I do not believe in capital punishment." Szuchon, 273 F.3d at 329-30. After affording a presumption of correctness to the state court decision, the Third Circuit found a Witherspoon violation, noting that the prosecutor had failed "to meet his burden under Witt of asking even a limited number of follow-up questions to show that [the juror's] views would render him biased." Id. at 331. As the Third Circuit noted, the facts of this case are virtually identical to those in Szuchon. Pet. App. 19a-20a.

In Martini, in contrast, there was a colloquy of the excluded juror. At times, he emphatically expressed his ability to set aside his personal beliefs and follow the court's instructions. Other responses given by the juror "create[d] considerable doubt" as to whether he

could do so. Martini, 348 F.3d at 366. On that record, while finding the habeas petitioner's claim of Witherspoon error "plausible," the Third Circuit deferred to the state trial court's ruling: "We cannot say by clear and convincing evidence that the state trial judge, who saw [the juror] and doubtless 'sized him up,' was incorrect in his finding." Id. at 368. The critical difference between this case and Szuchon on the one hand, and Martini on the other, was that there was support in the record for the trial court's ruling in Martini, while there was no such support here or in Szuchon. Pet. App. 18b.

The Third Circuit has only granted Witherspoon relief here and in Szuchon – cases where the excluded juror said nothing beyond an expression of opposition to the death penalty. In cases involving an actual inquiry into the Adams/Witt factors, the Third Circuit has deferred to trial court findings of juror bias. In addition to Martini, see Riley v. Taylor, 277 F.3d 261, 307-09 (3d Cir. 2001) (en banc); Deputy v. Taylor, 19 F.3d 1485, 1498-99 (3d Cir. 1994); Lesko v. Lehman, 925 F.2d 1527, 1547-48 (3d Cir. 1991).

Having found here that the exclusion of Ms. Hartling violated Witherspoon and Witt, and that Mr. Stevens had rebutted the presumption of correctness accorded to the state court finding, the Third Circuit affirmed the District Court's grant of a new sentencing hearing. Pet. App. 26a.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S ONLY QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF PROPERLY STATED RULES OF LAW, INCLUDING AEDPA DEFERENCE, TO THE FACTS OF THIS CASE.

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). In particular, this Court does not grant the writ simply to correct purported error by the lower court, which is what the Commonwealth asks this Court to do here. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

A. The Courts Below Correctly Found that the Exclusion of Ms. Hartling Violated This Court's Governing Sixth and Fourteenth Amendment Precedent.

In Witherspoon, this Court held as follows:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Id. at 522-23.

In cases decided after Witherspoon, this Court clarified the standard for determining whether a juror is sufficiently biased that she may be excluded from service. In *no case* has this Court wavered from the core holding of Witherspoon – that a juror may not be excused for cause

"simply because [she] voiced general objections to the death penalty." Id. at 522. This Court's Witherspoon decisions make it crystal clear that where, as here, a juror is dismissed immediately upon "voic[ing] general objections to the death penalty," with no further inquiry, her excusal for cause violates the Sixth and Fourteenth Amendments.

1. In Adams, this Court applied Witherspoon o a Texas statute, under which jurors were excluded if they indicated that the potential death penalty "would have any effect at all on [their] performance of their duties." Adams at 49. This Court found the Texas procedure to be unconstitutional:

> Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally.... But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.... [T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id. at 49-50. Adams thus reiterated that a juror's views and feelings about the death penalty are not sufficient in themselves to justify the juror's exclusion; rather, the question is whether those views and feelings would prevent the juror from following the court's instructions and obeying the juror's oath.

2. In Witt, this Court recognized that Witherspoon required courts to distinguish "between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Witt, 469 U.S. at 421.

It held that courts should apply the Adams test in making that distinction, and that the party seeking exclusion of a juror has the burden to "demonstrate, through questioning, that the juror lacks impartiality." Id. at 423 (citing Reynolds v. United States, 98 U.S. 145, 157 (1879)).

3. In Lockhart v. McCree, 476 U.S. 162 (1986), this Court again explained the limited basis for excluding jurors that is permitted under Witherspoon:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who *firmly* believe that the death penalty is unjust *may nevertheless serve as jurors* in capital cases so long as they state clearly that they are *willing to temporarily set aside their own beliefs* in deference to the rule of law.

Id. at 176. Again, firm opposition to the death penalty is not enough to justify exclusion; only an unwillingness to set aside such opposition is enough to justify exclusion.

4. The Court returned to this theme in Gray v. Mississippi, 481 U.S. 648 (1987). After quoting the above passage from Lockhart, the Court explained:

> The State's power to exclude for cause jurors from capital juries *does not extend beyond its interest in removing those jurors* who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Wainwright v. Witt,* 469 U.S. at 423, 105 S. Ct., at 851. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." *Witherspoon v. Illinois,* 391 U.S., at 523, 88 S. Ct., at 1778.

Gray, 481 U.S. at 658-59. In Gray, this Court also emphasized that deference to a trial court's findings of fact "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law," id. at 661 n.10 (citing Richmond v. Rogers, 365 U.S. 534, 547 (1961)), and that the State could not demonstrate error in the trial court's refusal to remove certain jurors for cause where there was "inadequate questioning regarding the venire

members' views." Id. at 663.

5. Finally, in Morgan v. Illinois, 504 U.S. 719 (1992), this Court again noted that the principles of Witherspoon "*demand inquiry* into whether the views of prospective jurors on the death penalty would disqualify them from sitting." Id. at 731.

The Commonwealth has not asked this Court to reconsider any of those decisions. And there is no genuine question that the exclusion of Ms. Hartling violated the principles set forth in the Witherspoon decisions from this Court. The sole relevant statement made by Ms. Hartling, and the sole basis for her removal for cause, was her statement: "I don't believe in the death penalty." Pet. App. 3e. The core holding of Witherspoon is that a prospective juror may not be excluded for cause "simply because [she] voiced [such] general objections to the death penalty." Witherspoon, 391 U.S. at 522. Similarly, Adams and Witt hold that in order to exclude a juror, the State has the burden, Witt, 469 U.S. at 423, of demonstrating that a prospective juror's views about the death penalty "would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." Id. at 424; Adams, 448 U.S. at 45. In order to meet that burden, there must be questioning concerning the juror's views. Witt, 469 U.S. at 423; Gray, 481 U.S. at 663. Here, neither the Commonwealth nor the trial court conducted any questioning of Ms. Hartling, and the Commonwealth utterly failed to show how, if at all, Ms. Hartling's opposition to the death penalty would affect her performance of her duties as a juror.

Nevertheless, the Commonwealth briefly argues that the Third Circuit's opinion conflicts with Witt, because Witt instructed that "deference must be paid to the trial judge who sees and hears the juror." *Petition* at 16 (quoting Witt, 469 U.S. at 424-25). This argument is baseless.

As it explicitly noted, the Third Circuit was well aware of the requirement that it defer to the trial court's finding. Pet. App. 17a ("a trial judge is in the best position to judge the credibility and demeanor of potential jurors during voir dire"). Here, however, the trial court made its finding on the basis of no more than an expression of opposition to the death penalty. As shown above, every one of this Court's Witherspoon decisions has recognized that opposition to the death penalty alone *is not enough* to support exclusion of a prospective juror. Where, as here, the trial court admittedly never engaged in the "relevant inquiry" under Witt and Adams, Pet. App. 7d, it is the trial court's exclusion of the juror – not the Third Circuit's ruling – that is inconsistent with Witherspoon, Adams and Witt.

On this record, it is quite apparent that, as the District Court found, Ms. Hartling "expressed only her general opposition to capital punishment." Pet. App. 19b. Her exclusion thereofore violated Witherspoon. As the Third Circuit put it, "Because Hartling was removed from the venire on the sole basis of her statement that she opposed capital punishment, Stevens was denied his constitutional right to a fair and impartial jury." Pet. App. 26a (citing Witherspoon, 391 U.S. at 522).

B. The Courts Below Correctly Ruled that the State Court's Finding of Bias Was Clearly and Convincingly Wrong.

The Commonwealth contends that the lower federal courts failed to give appropriate deference to the state court's finding of bias. Nothing, however, could be further from the truth. The District Court and the Third Circuit both deferred to the state court ruling. Pet. App. 12b (District Court applies standard of review under 28 U.S.C. § 2254(d)(2), i.e., whether state court ruling "resulted in a decision that was based on an unreasonable determination of the facts"; also

considers presumption of correctness under § 2254(e)(1) "relevant to this analysis"); Pet. App. 17a (Third Circuit holds state court's ruling entitled to § 2254(e)(1) presumption of correctness).[7] The Commonwealth's arguments are baseless.

1. The Commonwealth first urges that the Third Circuit "'set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record ....'" *Petition* at 9 (quoting Rice v. Collins, 126 S. Ct. 969, 972 (2006)). According to the Commonwealth, the Third Circuit ignored the trial judge's retrospective assumption – made several years after the fact – that he had relied on Ms. Hartling's demeanor in excusing her. *Petition* at 10-13 (quoting Pet. App. 7d-8d (trial court opinion); Pet. App. 26c-27c (Pennsylvania Supreme Court opinion); and Pet. App. 22a-23a (Third Circuit opinion). The Commonwealth's argument relies on selectively quoting from the Third Circuit's opinion – the Third Circuit actually took full account of the trial court's *post hoc* reliance on Ms. Hartling's purported demeanor.

The Third Circuit first pointed out the trial judge indicated that while he could not actually "remember the interchange with Hartling," he assumed that he "must have been relying on something emphatic in her demeanor." Pet. App. 20a. The Third Circuit acknowledged that a trial judge "is certainly entitled to rely on a potential juror's demeanor," id., but emphasized that under Witt there should be at least *some* support in the record for the trial judge's findings. Pet. App. 21a (citing Witt, 469 U.S. at 434).

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[7]As the Third Circuit noted, if a habeas petitioner rebuts the § 2254(e)(1) presumption of correctness, he has necessarily shown that the state court's decision "was based 'on an unreasonable determination of the facts' under § 2254(d)(2)." Pet. App. 17a n.10. Thus, the § 2254(e)(1) presumption applied by the Third Circuit was the standard most friendly to the Commonwealth.

Moreover, accepting the trial judge's statement that there was something "emphatic" about Ms. Hartling's demeanor, an emphatic expression of opposition to the death penalty by itself simply is not sufficient to support a challenge for cause. Pet. App. 21a. The Third Circuit did not ignore or "set aside" the trial judge's statement about Ms. Hartling's demeanor; rather, it held – consistent with Witherspoon, Witt and Lockhart – that her demeanor alone, in the absence of any questioning about her ability to set aside her opposition to the death penalty, was not enough to support a challenge for cause.[8]

2. The trial court asked Ms. Hartling a compound question:

> Q. Do you [1] have an opinion about the death penalty [2] which would prevent you from following the Court's instructions as to what penalty should be imposed?

Pet. App. 19b (quoting Pet. App. 2e). Based on that question, the Commonwealth argues "that the trial court had a plan in advance for dealing with prospective jurors who may express moral opposition to capital punishment, which was to limit its questions in order to solicit only those opinions that would prevent the juror from following the court's instructions." *Petition* at 13. This fanciful argument does nothing to advance the Commonwealth's contention that the Third Circuit failed to accord a presumption of correctness to the trial court's ruling.

First, neither Judge Kunselman himself (at trial or post-conviction, when he reviewed this claim and Petitioner's arguments) nor the Pennsylvania Supreme Court ever endorsed the Commonwealth's theory that the trial court "had a plan." The notion is pure speculation on the

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[8]Thus, the analogy that the Commonwealth attempts to draw to Rice fails for two reasons: (1) here, unlike Rice, there was no support in the record for the trial court's finding; and (2) even if it is presumed the juror's demeanor was as posited by the trial judge, that would not satisfy the requirements for exclusion under Witherspoon.

part of the Commonwealth.

Second, if the trial judge did have a "plan," it went awry. As the District Court pointed out, Ms. Hartling "'interpreted the question as seeking [her] views on capital punishment.' ... [A]s a result, she answered only the first part of the question, stating: 'I do not believe in the death penalty.'" Pet. App. 19b (quoting Szuchon v. Lehman, 273 F.3d 299, 330 (3d Cir. 2001) and Pet. App. 3e). Neither the prosecutor nor the trial judge "ask[ed] any additional questions to probe whether the veniremember could set aside her opposition to capital punishment and apply the law." Pet. App. 20b. As the District Court further noted, the Commonwealth has never pointed to "any authority in which the prosecution met its burden of exclusion under Witherspoon/Witt with so little questioning." Id. If the trial court did have a "plan," that plan – which involved ceasing questioning as soon as a juror expressed opposition to the death penalty – resulted in a straightforward violation of Witherspoon.

3. Finally, the Commonwealth contends that there was in fact record support for the trial court's finding. The Commonwealth points to what it claims are three sources of support: (a) the trial court's observation of Ms. Hartling's demeanor; (b) inferences from the compound question asked by the trial court; and (c) the fact that counsel did not object to Ms. Hartling's disqualification. *Petition* at 14 (quoting Witt, 469 U.S. at 434-35). Neither individually or cumulatively, however, do those sources support a finding that the Commonwealth *met its burden* to "demonstrate, through questioning, that the juror lacks impartiality." Witt, 469 U.S. at 423 (citing Reynolds v. United States, 98 U.S. 145, 157 (1879)).

a. The trial court's retrospective assumption about Ms. Hartling's demeanor at most would establish that her opposition to the death penalty was emphatically expressed. Pet.

App. 21a. As even the trial court recognized after the fact, however, the strength or weakness of the juror's opposition to the death penalty is not the "relevant inquiry." Pet. App. 7d. Strong opposition to the death penalty by itself is not grounds for exclusion: "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they ... are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart, 476 U.S. at 176. Indeed, exclusion of a juror on the basis of strong opposition to the death penalty – as took place here – violates Witherspoon's prohibition on the exclusion of jurors "on 'any broader basis' than inability to follow the law or abide by their oaths ...." Adams, 448 U.S. at 48 (quoting Witherspoon, 391 U.S. at 522 n.21).

b. Ms. Hartling's answer to the trial court's compound question, Pet. App. 2e-3e, likewise does not support a finding that she was unable to set aside her opposition to the death penalty and follow the law. After all, the only thing she said was, "I don't believe in the death penalty." Pet. App. 3e. As the District Court explained, Pet. App. 19b-20b, that answer simply is not enough to satisfy the prosecution's burden under Adams and Witt.

Moreover, as the Third Circuit explained at length, Pet. App. 24a-26a, this case is not like Witt. In Witt, the trial court questioned the juror at length about her views, and the juror indicated (with some degree of ambiguity) that her views would indeed interfere with her performance as a juror. Witt, 469 U.S. at 415-16. In Witt, then, the juror expressed ambiguity about her ability to follow the court's instructions, and "the trial judge was entitled to use the potential juror's ambiguity to resolve the relevant question – whether she could follow the law." Pet. App. 25a. The Third Circuit distinguished Witt as follows:

> Here, by contrast, the trial judge never followed up on Hartling's *initial*

> statement that she opposed capital punishment. Under *Witherspoon* and its progeny, including *Witt*, that was error. *See Witherspoon*, 391 U.S. at 522, 88 S.Ct. 1770; *Witt*, 469 U.S. at 422, 105 S.Ct. 844 (indicating that the key question is whether the venire member would "refuse[ ] to follow the statutory scheme" controlling when the death penalty should be given). As noted above, the fact that no follow-up questioning was utilized means that the trial judge was able to compile no record concerning whether Hartling was fatally biased against imposition of the death penalty. Moreover, and significantly for present purposes, the fact that no follow-up questioning occurred also means that *no ambiguity existed in Hartling's answers as to the relevant question* – whether she could follow the trial judge's instructions. After all, as noted, even if Hartling emphatically stated that she was opposed to capital punishment, *whether she could nevertheless follow the law posed a separate question*. *See Lockhart*, 476 U.S. at 176, 106 S.Ct. 1758. Accordingly, because Hartling was never asked about her willingness and ability to follow the law, the trial judge in Stevens's case – unlike the trial judge in *Witt* – was not in a position to evaluate and factor in her demeanor when answering the relevant question.

Pet. App. 25a-26a (emphasis on "initial" in original; some citations omitted).

c. The absence of any ambiguity here likewise deprives counsel's failure to object of any significance. Even in Witt, counsel's failure to object was not dispositive – it was simply an additional fact supporting the conclusion that the trial court's decision to exclude, *based on an ambiguous record*, was entitled to deference. Witt, 469 U.S. at 434-35. Here, as the Third Circuit correctly explained, there was "no ambiguity ... as to the relevant question," Pet. App. 26a – there was simply no record of the juror's views as to that question. Therefore, there was no conceivable reasonable basis for counsel's failure to object to her exclusion, and counsel's failure to object does not create an inference that Ms. Hartling was biased.[9]

The Third Circuit and the District Court correctly applied Witt and gave appropriate

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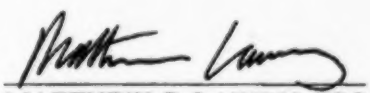
[9]Moreover, Petitioner has contended throughout that counsel's failure to object was ineffective assistance. Given that there was no procedural bar to consideration of the merits of Petitioner's Witherspoon claim, and that the merits of that claim were clear, the lower federal courts had no need to address the ineffective assistance claim.

deference to the trial court's findings. Because neither the prosecutor nor the trial court asked Ms. Hartling *any* questions concerning her ability to set aside her beliefs and follow the court's instructions, the court's exclusion of her was based solely on her expressed opposition to the death penalty, and therefore violated Witherspoon and its progeny. Indeed, on its facts this case is so indistinguishable from Witherspoon and Adams that the trial court's ruling was also contrary to and an unreasonable application of those decisions under 28 U.S.C. § 2254(d)(1). See Williams v. Taylor, 529 U.S. 362, 406 (2000) (state court decision is "contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent"); Gray, 481 U.S. at 661 n.10 (no deference to state court fact findings that are "dependent on an apparent misapplication of federal law"). However the case is analyzed, the trial court's exclusion of Ms. Hartling violated Witherspoon, and it did so in a manner that was both unreasonable and clearly and convincingly erroneous.

CONCLUSION

The trial court excluded prospective juror Nancy Hartling on the sole basis of her expressed opposition to the death penalty, with no attempt to determine whether she could set aside her beliefs and follow the court's instructions on the law. The Third Circuit, like the District Court, paid due deference to the state court ruling, and correctly found that the trial court's action clearly and unambiguously violated Witherspoon and its progeny. Not only was the Third Circuit's decision demonstrably correct, this case raises no issue worthy of this Court's certiorari review. This Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,



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